

In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:

KELLI MARIE CHESHER
(Chapter 7 Case 91-41090)

Debtor

GEORGIA HIGHER EDUCATION
ASSISTANCE CORPORATION,
Assignee

Plaintiff

v.

KELLI MARIE CHESHER

Defendant

Adversary Proceeding

Number 91-4086

FILED
at 4 O'clock & 11 min P.M.
Date 3/2/92
MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia

MEMORANDUM AND ORDER

Plaintiff filed a Complaint to Determine Dischargeability of a student loan debt on July 8, 1991. The Defendant, a Chapter 7 debtor, responded by alleging

that an exception to discharge under Section 523(a)(8) would impose an undue hardship on the Debtor and the Debtor's dependent. On October 25, 1991, a trial was held on the Complaint to Determine Dischargeability and Debtor's allegations of undue hardship. After consideration of the evidence introduced at trial, the briefs submitted by the parties, and a review of applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Defendant, Kelli M. Cheshier, filed a petition for relief under Chapter 7 of the Bankruptcy Code on May 24, 1991. Plaintiff, Georgia Higher Education Assistance Corporation ("GHEA") filed this adversary proceeding to determine the dischargeability of Debtor's student loans. Plaintiff alleges that the student loans are non-dischargeable under Section 523(a)(8).

Debtor contracted with Liberty Savings Bank for two student loans. One loan was for the principal amount of \$3,549.00 as evidenced by the promissory note signed on July 22, 1989. *See* Plaintiff's Exhibit 2. The second loan was for the

principal sum of \$4,000.00 as evidenced by the November 14, 1987 promissory note. *See* Plaintiff's Exhibit 1. Liberty Savings Bank assigned the loans to GHEA. Both loans are in default and have been reduced to judgment. *See* Plaintiff's Exhibits 3 and 4.¹ Defendant has other student loans, which when added to the amounts sought by Plaintiff exceed \$26,000.00 in educational loans owed by the Defendant.

Debtor borrowed money in order to attend the Savannah College of Art and Design. Debtor finished the requirements for her degree, but has been unable to receive her degree or a transcript as she remains indebted to the school for her last quarter's tuition and fees.

Debtor was trained for a career in interior design, but has been unable to obtain full-time employment in that field. Defendant testified that she has made every effort to obtain employment in her field in Savannah. Debtor has sent her resume to numerous Savannah businesses and had visited the Georgia State

¹ According to the Default Judgment, Debtor owed \$4,649.44 in principal on one loan, plus interest of \$857.70 with no attorney's fees added. *See* Plaintiff's Exhibit 3. A \$79.00 court cost is noted on the Writ of Fieri Facias, the second page of P-3. On the second default judgment, the principal is listed as \$3,658.69, with \$1,100.00 attorney's fees and \$558.68 in interest added. *See* Plaintiff's Exhibit 4. The Writ of Fieri Facias for this debt shows these items plus \$79.00 in court costs for a total of \$5,393.37. Additional interest accrued on these loans between the date of the default judgment and the date of Debtor's filing bankruptcy. Plaintiff asks that \$12,646.51, including principal, interest, court costs, and attorney's fees for both loans, be deemed non-dischargeable.

Employment Office and other employment agencies. She said one agency told her they would not have any jobs for her and that there was no need for her to return. Debtor also attempted to utilize the Savannah College of Art and Design Placement Office with no success.

At the time of the hearing the Debtor was working part-time at Savannah Christian School as an art instructor. Debtor testified that she worked two to three hours a day, five days a week, earning \$73.50 per week. Her job is only for one quarter, with no guarantee of employment in 1992.

Debtor's other income includes child support of \$100.00 per week. Debtor was divorced in 1991 and has a baby approximately one year old. Debtor lives with her parents, who help her with her living expenses. As both parents are employed, they cannot care for Debtor's child while she is at work. Debtor must take her child to day care before she goes to work. Debtor has no car of her own and must borrow a car from her parents or her ex-husband in order to go to work and take her child to day care.

Currently Debtor is not incurring expenses for rent, utilities, or an

automobile. Debtor testified at trial that she spends approximately \$255.00 per week on other expenses such as baby milk and food, diapers, her food, day care, her clothing, gas, and miscellaneous expenses. Including child support and \$73.50 per week from her job, Debtor has income of \$173.50 per week. Therefore, Debtor has a net weekly deficit of approximately \$80.00, which is being supplemented by her parents. If Debtor finds full-time employment she would need an automobile of her own which would increase her expenses. The parties have stipulated that Debtor's income is below the poverty level.

Debtor attempted to renegotiate her payment plan with the Plaintiff. Before filing bankruptcy, Debtor paid \$20.00 per week sporadically on these student loans and offered to maintain a \$20.00 per week payment plan, which was rejected. Plaintiff demanded a \$50.00 per month per loan minimum payment on the student loans. Debtor admitted she could not pay the amounts demanded.

Debtor testified that she filed bankruptcy because of the difficulty in paying her student loans and in paying the debt to Savannah College of Art and Design.

CONCLUSIONS OF LAW

Section 523(a)(8) of the Bankruptcy Code excepts student loans from a debtor's discharge as follows:

(a) A discharge under . . . this title does not discharge an individual debtor from any debt--

(8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless--

(A) such loan, benefit, scholarship, or stipend overpayment first became due more than 7 years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or

(B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

The issue in this case is whether excepting Debtor's two student loans

would be an "undue hardship" on the Debtor and the Debtor's dependent. The burden is upon the Debtor to show that an undue hardship exists. In re Ballard, 60 B.R. 673, 674 (Bankr. W.D.Va. 1986). Debtor's showing of a mere hardship without showing undue hardship is not sufficient. Id. Undue hardship cases must be decided on a case-by-case basis after a fact specific inquiry. See Andrews v. South Dakota Student Loan Assistance Corp., (In re Andrews), 661 F.2d 702 (8th Cir. 1981).

In past decisions, this Court has adopted the three part test of Brunner v. New York State Higher Education Services Corp. (In re Brunner), 46 B.R. 752 (S.D.N.Y. 1985) *aff'd* 831 F.2d 395 (2nd Cir. 1987). The Second Circuit adopted the analysis of the District Court which required debtor to show: "(1) that the debtor cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans." Brunner, 831 F.2d at 396.

Although the proper standard for determining undue hardship is whether debtor's income is adequate to maintain a minimal standard of living, a

debtor's income level which is at or near the current poverty level is one factor to be considered. In re Lekowicz, 119 B.R. 237 (D.Colo. 1990). Where a family with a modest income has a reasonable budget showing no unnecessary or frivolous expenses, a debtor may be discharged from his student loan obligations for undue hardship; families should not live below the poverty level in order to pay back educational loans. See In re Correll, 105 B.R. 302 (Bankr. W.D.Pa. 1989).

Debtor's hardship should not only be currently present but such economic disadvantages and hardship should be expected to continue into the debtor's foreseeable future. In re Conner, 89 B.R. 744 (Bankr. N.D. Ill. 1988). According to the Bankruptcy Court in In the matter of Marion, 61 B.R. 815 (Bankr. W.D.Pa. 1986), the borrower's difficulties must exist ten years into the future with no hope of improvement.

The overriding policy of the Bankruptcy Code is to provide debtors with a fresh start. Local Loan Co. v. Hunt, 292 U.S. 234, 244, 54 S.Ct. 695, 699, 78 L.Ed. 1230 (1934). However, Congress intended to make the discharge of student loans more difficult than the discharge of other debts. Brunner, 831 F.2d at 396.

The first part of the Brunner test requires Debtor to show that she is unable to maintain a minimal standard of living given her income and expenses. Thus, the Debtor is required to show that making the monthly loan payment will cause her standard of living to fall below a 'minimal' level. Brunner, 46 B.R. at 754. The parties have stipulated that Debtor's income is below the federal poverty level. Debtor's income, with an \$80.00 deficit, is already below a minimal level without adding the expense for repaying the student loans.

Debtor's budget is reasonable for one person with a baby. First of all, there are no expenses for a home or rent, for utilities, or for purchasing an automobile. All of these expenses are left out of the budget as Debtor resides with her parents. The largest expenses are diapers, milk, food for the baby, and day care. Such expenses are necessary if Debtor is to care for her baby and work. All other items are small, \$10.00 to \$20.00, and reasonable. With Debtor's minimal income from work and child support she has an \$80.00 per week deficit without adding the payments for her loans. Debtor's parents are subsidizing many of Debtor's purchases. Debtor has demonstrated that her current income cannot support the loan payments.

Although Debtor's current financial situation is bleak, I must look at

her income producing potential and prospects for improvement in the future. However, that picture does not appear any better. If Debtor were to obtain better, full-time employment, she would need a vehicle of her own. Currently, she is borrowing transportation from her parents and her ex-husband, who work full-time. If Debtor were to find employment outside Savannah, she would have to pay rent, utilities and more of her living expenses. In addition, she would need full-time day care for her baby.

Unemployment and underemployment alone is insufficient for a finding of undue hardship. In re Molzer, 33 B.R. 627, 631 (Bankr. S.D.N.Y. 1983). Debtor is currently working part-time with no promise of a teaching position in 1992. According to Debtor's testimony, she has made every effort to obtain employment in her field in Savannah. She testified that she has sent her resume to numerous businesses in Savannah and has contacted several employment agencies and offices. The part-time work at Savannah Christian School was the only employment available to her. Since prospects for full-time employment are speculative and would result in additional expenses on Debtor's part, I conclude that Debtor would be unable to maintain a "minimal" standard of living if forced to repay these loans.

The second prong of the Brunner test requires "evidence not only of current inability to pay but also of additional, exceptional circumstances, strongly suggestive of continuing inability to repay over an extended period of time . . ." Brunner, 831 F.2d at 396. As Debtor's employment situation is not likely to improve within the near future and as her expenses are likely to continue to increase, Debtor has shown exceptional circumstances indicating her undue hardship. Debtor is unlikely to have the income to pay these debts for many years.

The third prong of the Brunner test requires debtor to show her good faith efforts to repay the loan and that the forces preventing her repayment are beyond her control. Brunner, 46 B.R. at 756. Debtor made sporadic payments on her student loans of about \$20.00 per month and offered to renegotiate her payment schedule and attempt to maintain payments of \$20.00 per month, which was rejected by Plaintiff. I find that Debtor attempted to make payments on the loans even though that was difficult with her budget.

Debtor did testify that she filed bankruptcy because of her difficulty with her student loans and the debt to Savannah College of Art and Design. Whether a debtor files bankruptcy to eradicate student loans is a factor in the good faith

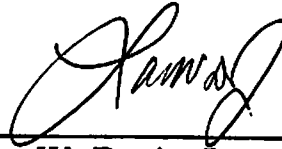
analysis for undue hardship. In re Correll, 105 B.R. at 306. However, in light of Debtor's attempts to find employment and her offer to make some minimal payment, I cannot conclude that Debtor acted in bad faith. Instead, Debtor has shown her good faith by attempting to find full-time employment and by making small payments on the debt when possible. Additionally, Debtor's budget is small and reasonable providing only for the barest of necessities. In the current economy, demand for Debtor's skills is low and Debtor has not met with success looking for jobs which are not directly in her field.

As Debtor has satisfied the three-part test of Brunner, based on her minimal standard of living, exceptional circumstances and good faith, she should be allowed to discharge her student loan debts.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the \$12,646.51 debt owed by Kelli M. Cheshier to the Georgia Higher Education Assistance Corporation as assignee of

Liberty Savings Bank is hereby discharged in its entirety.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 28th day of February, 1992.